The (Hopefully) Final Chapter in the *Intel* ERISA Litigation: Implications for Private Market Assets in 401(k) Plans

May 27, 2025

The Intel Litigation. On May 22, 2025, the Ninth Circuit Court of Appeals issued what should be the last word in a long-running challenge to the judgment of the fiduciaries of Intel Corporation's retirement savings plans for including private fund investment alternatives in those plans. In another victory for the Intel plans' fiduciaries, the Ninth Circuit affirmed the district court's holding that the plaintiffs failed to plausibly allege a fiduciary breach under the Employee Retirement Income Security Act of 1974 ("ERISA"). Our Debevoise Update on the district court ruling from January 2022 can be found here.

At issue was the Intel plans' inclusion of hedge funds and private equity funds as components in the customized fund investment options managed by the plan trustees and made available to plan participants. The plaintiffs alleged that allocating plan assets to these private funds breached ERISA's fiduciary duty of prudence because (i) an allocation of plan assets solely to more traditional investment options would have yielded higher returns to the plan participants over the relevant period, and (ii) the plans bore higher fees than they would have under that traditional investment allocation. The plaintiffs did not challenge either the construction of the customized fund investment options themselves, which were diversified products that also included traditional public equity, debt and cash-equivalent investments, or the process followed by the fiduciaries in approving the inclusion of these private funds.

Both the district court and the Ninth Circuit stated that prudence under ERISA is evaluated prospectively, based on a fiduciary's evaluation of an investment course of action, and not retrospectively based on the investment's performance. The fact that different investment decisions could have yielded better results and/or lower costs will not, on its own, create a per se breach of ERISA's duty of prudence. A plaintiff claiming a breach of ERISA's duty of prudence in reliance on an allegation of poor performance of an investment decision must plead that the fiduciaries' decision resulted in poorer performance than comparable investments and not investments with significantly different characteristics.[1]

The key takeaway from the courts' rulings in this litigation, and the correct answer under ERISA's fiduciary construct, is that there is no one-size-fits-all approach to asset allocation or investment options that can be made available in participant-directed defined contribution plans. The Intel plan fiduciaries made a thoughtful and deliberate decision to include private funds in the various investment options to dampen volatility and mitigate the risk of large losses during down periods in the broader debt and equity markets. The plaintiff's efforts to compare the performance of these investments to funds with different investment objectives and risk mitigation strategies was a key factor in the lower court's dismissal—imprudence cannot be established with an apples-to-oranges comparison. The same reasoning applied to the allegations that investors in the Intel plans incurred higher fees. As with the performance allegations, the Ninth Circuit concluded that the fact that different kinds of funds with distinct objectives and approaches carried different fees did not in itself demonstrate imprudence where the reference funds did not seek to mitigate risk in a similar manner as the funds offered through Intel plans. In addition, the Ninth Circuit noted that Intel had disclosed the fact that, given their broad diversification, the funds would not compare favorably with equity-heavy funds during bull markets.

Implications for Private Market Assets in Participant-Directed Retirement Plans. The *Intel* decision should give some comfort to plan fiduciaries looking to modernize investment options available to their plan participants by providing access to private funds as part of a well-diversified retirement portfolio.[2] The Ninth Circuit noted that both other courts and the U.S. Department of Labor ("DOL") have expressly rejected the notion that private funds are per se inappropriate for participant-directed retirement plans. The DOL did so in an information letter issued in June 2020, which was later supplemented and clarified in late 2021, right before the district court ruling that was the subject of this appeal (see our Debevoise Updates on the 2020 information letter here and the 2021 supplemental guidance here).

In the 2020 information letter, the DOL outlined a framework that is in many ways similar to at least one of the products Intel plan participants were offered—a diversified target date investment product of which private funds comprise a component. The 2021 supplemental guidance in essence emphasized that evaluating private market

1 Properly undertaken, this comparative exercise should survive a motion to dismiss, leaving open the factual question of whether any underperformance stemmed from an imprudent process.

2 Private asset investments have long been common in defined benefit plans since the enactment of ERISA, demonstrating that prudent investors acting in a like capacity and familiar with such matters have made—and benefitted from—such investments in the conduct of an enterprise subject to precisely the same statutory framework for over 50 years.

investments was itself something that only very sophisticated fiduciaries were capable of, apparently fearful that small plan fiduciaries would not have the knowledge and experience necessary to evaluate funds holding private assets.[3]

Notwithstanding the comfort arising from the Ninth Circuit's *Intel* decision, plan fiduciaries will note that the Intel litigation lasted nearly seven years before a meritless claim was dismissed. In addition, courts outside the Ninth Circuit are not bound by this precedent and could adopt a more plaintiff-friendly standard.[4] Consequently, despite the potential benefits of providing plan participants with the opportunity to obtain exposure to private market investments, plan fiduciaries may remain cautious. Absent an express statutory or regulatory safe harbor that provides a framework for a prudent evaluation of private market investments as a component of participant-directed defined contribution plans, plan fiduciaries could fear that offering such access—even when following the DOL's 2020 information-letter process in making their determination—could result in expensive and protracted litigation.

As private market investments have become an increasingly larger share of the investment market and play a growing role in portfolio diversification, plan fiduciaries that wish to make available a modern and truly diversified set of investment options should welcome the development of a market for products that provide defined contribution plan participants with access to such private investments. With appropriate disclosure of the character and risks associated with private market investments, retirement savers could benefit from the opportunity to allocate a portion of their assets to investments with different profiles than traditional options, potentially providing returns less correlated with public markets over different time horizons. One salutary benefit to plan fiduciaries and plan participants of a robust market of products would be a greater ability to "shop" among products with different fees, exposure, strategies and risk levels. We continue to be of the view that, properly structured, private funds can be an important component of a well-diversified, long-term investment portfolio.

As has been reported in various news outlets, the Trump administration has indicated an interest in easing the path towards access to private markets for retirement savers. This aligns with a broader push to provide retail access to private market investment strategies, as private market investments continue to play an increasingly important

3 This concern seems misplaced given that the DOL's prior information letter noted that, in considering whether to make available an investment option inclusive of private assets, plan fiduciaries would need to determine whether they had the skills, knowledge and experience to make the required determinations or need to seek the assistance of a qualified investment advisor who had such expertise.

4 The concurring opinion in the Ninth Circuit laid out ways in which the plaintiffs in the case could have presented a claim that could have withstood a motion to dismiss, leading to further litigation and its related expense.

role in portfolio diversification. This push has the support of the U.S. Securities and Exchange Commission, as evidenced by a flurry of recent exemptive orders and Commission announcements designed to ease regulatory impediments associated with retail investment into private investment strategies.

The most likely path to access for ERISA-covered retirement plans would be to expand on the DOL's thoughtful and helpful 2020 information letter framework and leverage the Intel plan fiduciaries' approach as building blocks to offer professionally managed, diversified funds in which private market investments are a component. Such a model would offer access to private market investments with the professional management and expertise necessary for the prudent management of such investments, yet still meet liquidity needs inherent in participant-directed defined contribution plans. A DOL safe harbor regulation aligned with professionally managed, diversified funds would give fiduciaries who follow an appropriate fiduciary process the confidence to expand the investment opportunities for plan participants and construct a more diversified portfolio, seeking investment returns appropriately targeted to plan participants.

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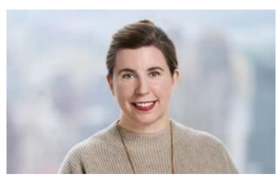

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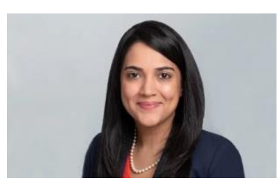

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